Tentative Rulings for September 29, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

16CECL06446 ***JD Home Rentals v. Pena, et al.*** **is continued to Thursday, October 25, 2016 at 3:30 p.m. in Department 402.**

14CECG01317 ***Moffett v. California Cancer Associates for Research and Excellence, Inc.*** **all motions are continued to Thursday, October 20, 2016, at 3:30 p.m. in Dept. 503.**

15CECG00900 ***Leon v. Gursaran, et al.,*** **is continued to October 13, 2016, at 3:30 in Dept 503.**

15CECG02755 ***C.A. Vanderham and Sons Dairy, et al. v. J & D Wilson and Sons Dairy, et al.*** **is continued to Thursday, October 13, 2016, at 3:30 p.m. in Dept. 502.**

14CECG02305 ***Stevenson v. Community Medical*** **is continued to Tuesday, October 4, 2016 at 3:30pm in Dept. 402.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(29) **Tentative Ruling**

Re: ***Financial Pacific Leasing, Inc. v. Hector Davila, et al.***
Superior Court Case No. 16CECG02295

Hearing Date: September 29, 2016 (Dept. 402)

Motion: Writ of possession

Tentative Ruling:

To deny without prejudice.

Explanation:

"At the hearing, a writ of possession shall issue if both of the following are found:
(1) The plaintiff has established the probable validity of the plaintiff's claim to possession of the property.
(2) The undertaking requirements of Section 515.010 are satisfied."
(Code Civ. Proc. §512.060(a).)

Section 515.010 requires the undertaking provide "that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against the plaintiff. The undertaking shall be in an amount not less than twice the value of the defendant's interest in the property or in a greater amount." (Id. at (a).)

To determine the value of defendant's interest, the court should take "the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and any other factors necessary to determine the defendant's interest in the property." (Code CIv. Proc. §515.010(a).)

Where it is determined that the defendant has no interest in the claimed property, "the court shall waive the requirement of the plaintiff's undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of subdivision (b) of Section 515.020." (Code Civ. Proc. §515.010(b).)

In the case at bench, Plaintiff has not provided an undertaking, or shown that one should not be required. Plaintiff also has not submitted evidence of the market value of the forklift that is the subject of the motion, provided a foundation for the attachments included in support of the motion, or proof of Defendant's alleged missed payments. Plaintiff also alleges the property is located at two different addresses. (See

Application, ¶7; Compl., ¶23; Decl. of White, ¶15.) Moreover, the copies of the EFA and Assignment that Plaintiff has provided are of such poor quality that they are indecipherable.

Plaintiff here has failed to present sufficient evidence to show the probable validity of its claim, to provide an undertaking or show why one should not be required, and to provide the Court with adequate evidence to determine the fair market value of the equipment that is the subject of this motion. Accordingly, the motion is denied without prejudice.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JH on 9/28/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Arteaga v. Fresno Community Regional Medical Center***
Court Case No. 13CECG03906

Hearing Date: **September 29, 2016 (Dept. 402)**

Motion: Motion by Ashwin Bhatt, M.D. and Community Regional Anesthesia Medical Group, Inc. for Summary Judgment, or in the Alternative, Summary Adjudication

Tentative Ruling:

To grant. Defendant Bhatt is directed to submit to this court, within 5 days of service of the minute order, a proposed judgment consistent with the court's summary judgment order.

Rulings on evidentiary objections are as follows:

- Plaintiffs' Objections: To overrule all objections.
- Dr. Bhatt's Objections:
  - To sustain as to: Objection Nos. 1, and 3 - 12
  - To overrule as to: Objection No. 2

Explanation:

Plaintiffs' Procedural Objections:

Defendant's failure to include the Custodian of Records' declaration authenticating the hospital records was not fatal to his motion. Plaintiffs themselves offered into evidence a CD which contains the entire authenticated medical record, so even if defendant had not filed the Notice of Errata and filed the Custodian's declaration, this would have "cured" his evidentiary error, as the court is entitled to consider "*all* of the evidence set forth in the papers." (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749, *as modified (June 14, 1995)*—Evidence supplied by plaintiff in opposition to summary judgment sufficient to help defendant satisfy its burden as moving party, to shift burden to plaintiff. See also *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289—"In summary judgment proceedings, gaps in a party's evidentiary showing may certainly be filled by the opposing party's evidence.")

As for Dr. Mills' error in citing the date Mr. Perez was admitted to the hospital and the date of the surgery, plaintiffs cannot credibly argue that they were confused over what surgery Dr. Mills was opining about, or that he was opining about a "different surgery" and that this was not simply a typographical error. Their own opposition on the merits amply illustrates they knew which surgery Dr. Mills meant and that they were well informed of the correct dates. This error did not prejudice them in any way in opposing this motion.

Evidentiary Objections:

Plaintiffs' objections based on the procedural errors noted above (Objections 1-4) are overruled based on the points noted above. As for their objections to Dr. C's testimony about Dr. Bhatt's competency and performance (Objections 5-7), they correctly point out that Dr. C "lacks personal, firsthand knowledge *because he was not present*" during the time in question (and this important factor will be further discussed below). However, that is beside the point regarding this testimony: Dr. C was being asked his opinion based on his general knowledge of Dr. Bhatt's skill, after being asked foundational questions establishing his years of experience with defendant *or*, in the case of the question asking him if he was "critical in any way of Dr. Bhatt's performance" that day, he was being asked his opinion as an expert based on his understanding of what happened, which experts are allowed to do.

Defendant's Objection 1 is sustained as immaterial. Objection 2 is overruled as this is a statement of the expert's opinion, which is why he is testifying. Objections 3-12 are sustained because the expert opinion is impermissibly based on assumptions not supported by the evidence, as more fully discussed below.

Burden on Summary Judgment:

As moving party, a defendant bears the initial burden of production to show that plaintiff cannot establish one or more elements of the at-issue cause of action or to show that there is a complete defense. (Code Civ. Proc. § 437c, subd. (p)(2).) Only after the moving party has carried this burden does the burden of production shift to the other party to show that a triable issue of one or more material facts exists. (*Id.*)

Declarations by expert witnesses are generally required when expert witness testimony would be required at trial (such as on the issue of the standard of care in a professional malpractice case). (See, e.g., *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523.) Such declarations are admissible to support or defeat a summary judgment motion if the requirements for admissibility are established in the same manner as if the declarant was testifying at trial. An expert opinion based on speculation or conjecture is inadmissible. (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.)

California courts have incorporated the expert evidence requirement in ruling on summary judgment motions in medical malpractice cases. "When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence." (*Munro v. Regents of Univ. of Calif*. (1989) 215 Cal.App.3d 977, 984-85.)

The declaration must contain facts showing the expert's qualifications (competency) to express the opinion in question; e.g., facts showing the declarant has the training, experience or necessary skill to render an opinion on the particular matters in controversy. (*Salasquevara v. Wyeth Labs., Inc.* (1990) 222 Cal.App.3d 379, 387.) It must also include facts showing: 1) the matters relied upon by the expert in forming the

opinion; 2) the declarant's opinion rests on matters of a type reasonably relied upon by experts; and 3) the factual basis for the opinion. (*Kelley*, *supra*, 66 Cal.App.4th at 524.)

Where the moving party produces competent expert opinion declarations showing that there is no triable issue of fact on an essential element of the opposing party's claim (e.g. that a medical defendant's treatment fell within the applicable standard of care), the opposing party's burden is to produce competent expert opinion declarations to the contrary. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487; *Munro v. Regents of University of California* (1989) 215 Cal.App.3d 977, 984-985--"When a defendant moves for summary judgment and supports his motion with expert declarations that his conduct fell within the community standard of care, he is entitled to summary judgment unless the plaintiff comes forward with conflicting expert evidence" (citations and internal quotes omitted).)

Analysis of the Merits:

Summary judgment cannot be granted on the statute of limitations issue, as there is a triable issue of material fact as to when plaintiffs were first apprised of the possibility of Dr. Bhatt's negligence. It is clear they knew of his role in the surgery well before Dr. C's deposition. However, they claim they did not realize they might have a claim against him until they deposed Dr. C. This contention is supported by the fact that this is the crucial testimony they rely on in attempting to create a triable issue as to Dr. Bhatt's negligence (namely, Dr. C's vehement denials of having been apprised by Dr. Bhatt of the urgency of Mr. Perez' condition). Their expert opines that crediting Dr. C's testimony over Dr. Bhatt's is the crucial factor on which Dr. Bhatt's liability depends.

Defendant Bhatt met his burden of production on this motion in establishing that his treatment of Mr. Perez fell within the applicable standard of care. However, plaintiffs failed to produce competent expert opinion establishing a triable issue of material fact on this score. Dr. Krantz opines that whether Dr. Bhatt breached the standard of care turns on whether the trier of fact believes Dr. Bhatt or Dr. Chaudhry "as to the above events." By that, he refers to Dr. Bhatt's testimony about directing OR personnel to relay information to Dr. Chaudhry regarding the patient's severe bleeding, that he was giving him blood products including Factor VII, and that there was an alarming amount of blood coming out of the chest tube prior to the Code Blue. Dr. Chaudhry denied receiving such information prior to the Code being called, and in fact he pointedly called all such contentions "false." Dr. Krantz opines that if the trier of fact believes Dr. Chaudhry, then Dr. Bhatt's negligence in failing to keep Dr. Chaudhry apprised was a substantial factor in causing Mr. Perez' injuries because he caused delay in the patient receiving appropriate intervention.

An expert is allowed to express an opinion based on assumed facts. (*Rosenberg v. Goldstein* (1966) 247 Cal.App.2d 25, 29; *People v. Vang* (2011) 52 Cal.4th 1038, 1045—Expert may render opinion testimony based on facts given "in a hypothetical question that asks the expert to assume their truth.") However, each fact the expert is asked to assume must be "rooted in facts shown by the evidence." (*Id.*—"The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury.)

According to Dr. Krantz' own testimony, the critical factor in determining Dr. Bhatt's negligence is whether or not he *directed the OR personnel to contact Dr. Chaudhry* with critical information. In forming this opinion, Dr. Krantz assumes Dr. Chaudhry's testimony *contradicts* Dr. Bhatt's testimony on this score, and thus it is a question of which testimony the trier of fact will believe. However, Dr. Chaudhry's testimony does not – and cannot – contradict Dr. Bhatt's testimony as to what Dr. Bhatt told the OR personnel to do. As plaintiffs, themselves, have pointed out in objecting to Dr. Chaudhry's testimony about Dr. Bhatt's competence (Objections 5, 6, and 7), Dr. Chaudhry lacks personal knowledge of what happened in the OR after he left. He can testify to the calls he received from the nurses, and to what *they* told him, but he cannot not testify to *what Dr. Bhatt did or did not tell the nurses to convey* in those phone calls. Even if Dr. Chaudhry's testimony is believed, it does not contradict Dr. Bhatt's testimony. Thus, plaintiffs failed to establish, as a triable issue of material fact, that Dr. Bhatt did not meet his standard of care because he failed to attempt to summon surgical help as Mr. Perez' condition deteriorated. And other than this issue, plaintiffs' own expert agreed that Dr. Bhatt in all other respects met his standard of care. There is no triable issue of material fact. Summary judgment must be granted.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: JH **on** 9/28/16 .
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Foresteire v. Forestiere***
Case No. 15 CE CG 01076

Hearing Date: September 29th, 2016 (Dept. 402)

Motion: Defendant's Motion for Relief from Waiver of Jury

Tentative Ruling:

To grant defendant's motion for relief from waiver of jury trial. (Code Civ. Proc. § 631, subd. (g).)

Explanation:

"The California Constitution, article I, section 16, provides in pertinent part: 'Trial by jury is an inviolate right and shall be secured to all.... In a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute.' Jury trial is a 'basic and fundamental part of our system of jurisprudence.' [Citation.]" (*Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810.)

"The right to a trial by jury as declared by Section 16 of Article I of the California Constitution shall be preserved to the parties inviolate. In civil cases, a jury may only be waived pursuant to subdivision (f)." (Code Civ. Proc. § 631, subd. (a).)

"A party waives trial by jury in any of the following ways: … (5) By failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee." (Code Civ. Proc., § 631, subd. (f).)

However, "The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." (Code Civ. Proc. § 631, subd. (g).)

"In exercising such discretion, courts are mindful of the requirement 'to resolve doubts in interpreting the waiver provisions of section 631 in favor of a litigant's right to jury trial. [Citations.]' [Citation.] Accordingly, '[w]here the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citation.] A trial court abuses its discretion as a matter of law when "... relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver. [Citations.]" [Citations.]' [Citation.]" (*Tesoro Del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619, 638.)

"The mere fact that trial will be by jury is not prejudice per se." (*Johnson-Stovall v. Superior Court*, *supra*, 17 Cal.App.4th at pp. 810–811.)

Also, "The denial of the right to jury trial is reversible error per se. [Citations.] No showing of actual prejudice is required." (*Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698.)

"Where the right to jury is threatened, the crucial focus is whether any prejudice will be suffered by any party or the court if a motion for relief from waiver is granted. [Citation.] A trial court abuses its discretion as a matter of law when '... relief has been denied where there has been no prejudice to the other party or to the court from an inadvertent waiver. [Citations.]' [Citations.]" (*Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104.)

Here, defendant claims that he inadvertently failed to post his jury fees by the time of the case management conference, and that he was confused as to when the fees were due because the Fresno Superior Court still uses an outdated form that incorrectly advises the parties that their jury fees are due 25 days prior to the trial date, rather than by the date of the case management conference, as section 631 now requires.

Indeed, it does appear that the court's outdated minute order form is confusing and inconsistent with the amended statute regarding the deadline for payment of jury fees, since the form incorrectly states that parties must post jury fees 25 days prior to the trial date, rather than by the date of the CMC. However, defendant did apparently attempt to post his jury fees by the date of the CMC, so it does not appear that he was overly confused by the misleading language on the minute order form. The delay in posting fees was apparently not due to his confusion over the minute order's language, but rather because he did not provide all the documents needed to obtain a fee waiver regarding the jury fees.

Nevertheless, the fact remains that defendant attempted to obtain a fee waiver for the jury fees by the time of the CMC, and that the fee waiver was denied, resulting in his waiver of his jury trial right even though the fee waiver was later granted. While defendant has not made a strong showing of prejudice from the waiver, he is not required to show any specific prejudice when seeking relief from the waiver, since the waiver of the right to jury trial is considered per se prejudicial. (*Martin v. County of Los Angeles*, *supra*, 51 Cal.App.4th at p. 698.)

Also, plaintiff has not provided any evidence or made any showing that he would suffer any prejudice if the motion for relief is granted. While plaintiff argues that he will have to incur additional costs for litigating a lengthy jury trial, he submits nothing to support his contention that a jury trial will take substantially longer than a court trial. In any event, the mere fact that plaintiff will have to prepare for a jury trial rather than a court trial is not enough, by itself, to show prejudice. (*Johnson-Stovall v. Superior Court*, *supra*, 17 Cal.App.4th at pp. 810–811.) Although plaintiff seems to argue that he has prepared for trial based on the assumption that there would be no jury trial, the fact remains that, despite defendant's waiver, the case is presently set for jury trial and plaintiff has not requested a court trial. Therefore, plaintiff has failed to show that he would suffer any actual prejudice if the motion for relief from the jury trial waiver is granted.

In addition, while plaintiff argues that defendant has not been diligent in seeking relief since the waiver occurred over a year ago and defendant did not seek relief until recently, the defendant's lack of diligence is not enough, by itself, to justify denying relief from the waiver. Without some showing of prejudice to plaintiff if relief is granted, the court would abuse its discretion if it denied relief. (*Wharton v. Superior Court*, *supra*, 231 Cal.App.3d at p. 104.) As the plaintiff has not made any showing that it will suffer prejudice if the motion is granted, the court intends to grant the motion for relief from the jury trial waiver.[1]

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____JH_____ on ____9/28/16_____.
(Judge's Initials) (Date)

[1] Plaintiff also contends that the defendant's notice of motion is defective, since it does not clearly state that it is seeking relief from the jury trial waiver. However, plaintiff clearly understands the nature of the relief sought and he has raised substantive arguments in opposition to the motion, so even though the defendant's notice of motion may not be perfectly drafted, it was sufficient to place plaintiff on notice of the nature of the motion and the basis for relief.

Tentative Rulings for Department 403

03

Tentative Ruling

Re: ***Baldwin v. Aon Risk Services Companies, Inc.***
Case No. 14 CE CG 00572

Hearing Date: September 29th, 2016 (Dept. 403)

Motion: Plaintiffs/Cross-Defendants' Motion to Bifurcate Punitive Damages

Defendants/Cross-Complainants' Motion to Regulate Order of Proof at Trial

Tentative Ruling:

To grant plaintiffs/cross-defendants' motion to bifurcate punitive damages. (Civil Code § 3295, subd. (d).)

To deny defendants/cross-complainants' motion to regulate order of proof at trial, without prejudice, as premature. However, the defendants may raise the issue again when the case is closer to trial and has been assigned to a trial judge.

Explanation:

Motion to Bifurcate Punitive Damages: Under Civil Code section 3295, subdivision (d), "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294." (Civ. Code, § 3295, subd. (d), emphasis added.)

"Section 3295 was enacted in 1979 to protect against the premature disclosure of a defendant's financial condition when punitive damages are sought…. As an evidentiary restriction, section 3295(d) requires a court, upon application of any defendant, to bifurcate a trial so that the trier of fact is not presented with evidence of the defendant's wealth and profits until after the issues of liability, compensatory damages, and malice, oppression, or fraud have been resolved against the defendant. Bifurcation minimizes potential prejudice by preventing jurors from learning of a defendant's 'deep pockets' before they determine these threshold issues." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777–778, internal citations omitted.)

"While the statute refers only to evidence of the defendant's financial condition, in practice bifurcation under this section means that all evidence relating to the amount of punitive damages is to be offered in the second phase, while the

determination whether the plaintiff is entitled to punitive damages (i.e., whether the defendant is guilty of malice, fraud or oppression) is decided in the first phase along with compensatory damages." (*Holdgrafer v. Unocal Corp*. (2008) 160 Cal.App.4th 907, 919, emphasis in original.)

Here, plaintiffs/cross-defendants have moved to bifurcate the issue of their financial condition and the amount of punitive damages that may be imposed from the trial of the rest of the action. Since the language of section 3295, subd. (d) is mandatory, the court must grant bifurcation of the amount of punitive damages from the trial of the other issues in the case. While defendants/cross-complainants contend that plaintiffs are improperly seeking to bifurcate the issue of whether they acted with malice, fraud or oppression from the rest of the case, this does not appear to be gist of the motion. Plaintiffs seek to bifurcate the issue of the amount of punitive damages, including evidence of their financial condition, which is allowed, and indeed required, by the language of section 3295, subd. (d).

Also, while defendants argue that it would be inefficient and wasteful to bifurcate the trial because plaintiffs' financial condition will already have been heard by the same jury that will try both phases of the case, defendants' argument ignores the mandatory language of section 3295, subd. (d). There is no provision in the statute for denial of a motion to bifurcate the issue of the amount of punitive damages where doing so would be inefficient or duplicative. The statute requires bifurcation whenever a defendant requests such relief, as cross-defendants have done here.

In addition, although defendants cite to N*otrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911 to support their position that bifurcation is not required where evidence of a defendant's financial condition is relevant to its liability, *Notrica* is distinguishable. In *Notrica*, the defendant had already introduced evidence of its own financial condition at trial, and thus the plaintiff was allowed to introduce financial evidence to rebut defendant's showing and place defendant's evidence in perspective. (*Id*. at 939.) Here, there has been no similar introduction of financial evidence by the plaintiffs, so *Notrica* does not apply.

Therefore, the court intends to grant the motion to bifurcate.

Motion to Regulate Order of Proof at Trial: The court intends to deny the motion to regulate order of proof at trial, without prejudice, as it is premature for the court to determine the order of proof at this stage of the case. The trial date has been continued to January 23rd, 2017, so it is still about four months away. At this time, it would be premature to determine the order in which the parties will try their claims. It is not even certain that the same judge will hear the present motion and try the case. It would be far preferable to have the actual trial judge determine matters like the order of proof at trial, and which party will put their case on first. Therefore, the court intends to deny the motion to regulate the order of trial without prejudice. However, the parties may raise the issue with the trial judge after the case is assigned to a judge for trial.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: _____KCK_____ on ___09/27/16_____.

(Judge's Initials) (Date)

(28) **Tentative Ruling**

Re: ***Ramos v. Radisson Hotels International***

Case No. 14CECG02541

Hearing Date: September 29, 2016 (Dept. 403)

Motion: By Defendant for Summary Judgment.

Tentative Ruling:

To deny the motion the motion for Summary Judgment.

Explanation:

To obtain summary judgment, "all a defendant needs to do is to show that the plaintiff cannot establish at least one element of the cause of action." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853. If a defendant makes this showing, the burden shifts to the plaintiff to demonstrate that one or more material facts exist as to the cause of action or as to a defense to a cause of action. (CCP § 437(c), subdivision(p)(2).)

In a summary judgment motion, the pleadings determine the scope of relevant issues. (*Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74.) A defendant need only "negate plaintiff's theories of liability *as alleged in the complaint;* that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings." (*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486, 493 (emphasis in original).)

The court examines affidavits, declarations and deposition testimony as set forth by the parties, where applicable. (*DeSuza v. Andersack* (1976) 63 Cal.App.3d 694, 698.) Any doubts about the propriety of summary judgment are to be resolved in favor of the opposing party. (*Yanowitz v. L'Oreal USA, Inc.* (2003) 106 Cal.App.4th 1036, 1050.)

A court will "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

Furthermore, the moving party must identify the issues and cite specific evidence showing there is no controversy in the separate statement; "If it is not set forth in the separate statement, *it does not exist*." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 (emphasis in original).)

Plaintiff's sole cause of action is one for "Negligence-Premises Liability." The elements of a premises liability action are: 1) the defendant owned the property where the harm occurred; 2) the defendant was negligent in the use or maintenance of the property; 3) the plaintiff was harmed; and 4) the defendant's negligence was a substantial factor in causing the plaintiff's harm. (CACI 1000.)

Here, Plaintiff alleges that Defendant is liable for not providing safe flooring when it allowed liquid on the floor in a hotel hallway where Plaintiff slipped, fell, and suffered the injuries.

The parties' dispute centers on the extent to which Defendant Uniwell had constructive knowledge of the existence of the liquid on the floor. Defendant makes the argument that "the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (Memorandum of Points and Authorities in support of motion, p. 4 (*citing Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1206).) However, this is not Plaintiff's burden on a summary judgment motion. It is Defendant's burden to show that one or more elements of Plaintiff's case cannot be established. (Code Civ.Proc. 437c, subd.(p)(2).) Therefore, it is the Defendant's burden to show that Plaintiff cannot establish the notice.

Defendant presents the following asserted relevant material facts: 1) Plaintiff had no knowledge of how long the liquid was on the floor (Undisputed Material Fact ("UMF") No. 3); 2) that Defendant had employees who were expected to "regularly monitor and visually inspect the entire Hotel Premises, on a daily basis, for dangerous conditions, which includes inspecting the hallway floors for spills and slippery substances." (UMF No. 4); 3) "27 Uniwell employees were working in or near the area of his fall and frequently walking through the area where he fell, and none of those employees observed a liquid substance on the floor" (UMF No. 5); and 4) Defendant had no actual notice of a spilled liquid substance in the hallway of the Hotel Premises at any time prior to Plaintiff's fall. (UMF No. 6).

According to the cases cited by Defendant, a premises liability case can only be made if the property owner did not make an inspection within a time period that was reasonable under the circumstances. (*Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 447.) However, none of the undisputed material facts presented by Defendant include the explicit proposition that 1) notwithstanding the presence of so many employees in the general area that morning, there was an actual inspection of the hallway at or shortly before the time of the incident and/or 2) that any "inspection" was reasonable and/or 3) would have discovered the liquid in a reasonable time. Therefore, based simply on the Separate Statement, Defendant has not met its burden of showing that an element of premises liability-Defendant's breach of the standard of care-cannot be established.

In Defendant's Memorandum of Points and Authorities, Defendant does make the argument that Ms. Forsyth, according to her declaration the hotel's food/beverage manager and co-manager on duty," walked through the area in question "approximately five minutes before the incident," but did not observe any unsafe

condition on the floor. (Forsyth Declaration ¶¶ 4-5.) However, as pointed out by Plaintiff, this declaration appears to be in conflict with Ms. Forsyth's deposition. In response to the questions of whether she had any idea how long the liquid was in the area, including whether it had been there for longer than ten minutes or a half hour, her response was that she did not know. (Ex. 1 to Plaintiff's Evidence, Deposition of Forsyth, p. 30-31.) Read in the light most favorable to Plaintiff, it therefore appears there is at least a conflict on this point, which therefore constitutes a dispute of material fact.

Defendant also cites to discovery responses that, it contends, show that Plaintiff cannot make his case. However, the issue is not whether Plaintiff knows how long the offending liquid was present, but whether Defendant can produce evidence that its inspection regime was reasonable.

The parties dispute the application of *Ortega v. Kmart* (2001) 26 Cal.4th 1200 to this case. Defendant argues that the case stands for the proposition that a plaintiff has the burden of showing that a dangerous condition was present long enough to charge the property owner with constructive knowledge of its existence. (*Id.* at 1204-06.) This is true. But, for purposes of a motion for summary judgment, this is exactly an element that *Defendant* has the burden of negating. As noted above, that "ultimate material fact" does not appear in Defendant's separate statement and, even if it were, as noted above, this appears to be in dispute based on Forsyth's deposition answers.

The objections to the evidence generally go to personal knowledge and weight of the evidence; therefore, they are overruled. The Court has relied only on admissible evidence in rendering this decision.

Therefore, because Defendant has not borne its initial burden of persuasion, and there is at least a dispute of material fact as to constructive notice, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 09/27/16.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Tran v. People of the State of California***
Court Case No. 15CECG01072

Hearing Date: **September 29, 2016 (Dept. 403)**

Motion: Defendant State of California's Motion to Amend Answer

Tentative Ruling:

To deny, as there is no answer on file and therefore there is nothing to amend.

Explanation:

Defendant states in its moving brief that it filed its answer on June 22, 2015. However, no such answer is in the court's file or shown on the court's online filing system, on that date or any other. The court has also checked the two cases that are related to this case (Case #14CECG00243 and Case #14CECG02079, which are now consolidated, with Case #14CECG00243 as the master file), and the answer was not filed in either of those cases in error. Defendant did not attach a copy of the purported answer (with or without a file stamp). The court can only assume that even if defendant served plaintiff with an answer, it was never actually filed. Therefore, there is nothing to amend.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK **on** 09/27/16 .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Thomas A. Glaski v. Bank of America et al.***
Case No. 09 CECG 03601

Hearing Date: September 29, 2016 **(Dept. 403)**

Motion: Summary Judgment, or in the alternative, summary adjudication by the Defendants

Tentative Ruling:

To take the matter under advisement upon the filing of the Order permitting the stipulation or upon the filing of Defendant's Answer as set forth infra.

Explanation:

As stated in the previous ruling, in *Glaski v. Bank of America, National Association* (2013) 218 Cal.App.4th 1079, the Fifth District Court of Appeal addressed "whether a postclosing date transfer into a securitized trust is the type of defect that would render the transfer void." In making this determination, the appellate court adopted the allegation at ¶ 7 of the Second Amended Complaint stating that the WaMu Securitized Trust is governed by New York law. [*Glaski v. Bank of America, National Association*, supra, 218 Cal.App.4th at 1096-1097.]

However, in support of its motion, the moving Defendants have submitted a copy of the Pooling and Servicing Agreement regarding the document entitled "LaSalle Bank NA, as trustee for WaMu Mortgage Pass Through Certificates Series 2005-AR17 Trust" as Exhibit 1 attached to the Declaration of Amber Alegria. The Agreement states at Art. I, §1.01 and Art. II, § 2.01.2 that it is governed by the law of Delaware. Plaintiff also admits this fact. See page 8 lines 14-19 of his Memorandum of Points and Authorities in opposition to the motion and the Declaration of Thomas J. Adams at ¶ 14. In addition, Plaintiff addresses whether the law of Delaware governs at page 6 lines 3-9 of Plaintiff's Supplemental Brief. Accordingly, the "law of the case" doctrine is inapplicable due to the fact that the Trust in question is governed by the law of Delaware. See *Clemente v. State of California (1985) 40 Cal.3d 202.*

However, the Second Amended Complaint still alleges that the Trust is governed by the law of New York. See ¶ 7. As a matter of law, an opposing party's opposition papers cannot create issues outside the pleadings and are not a substitute for amendment. [*Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486 at 493; *Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 421-423, 428-430—plaintiff could not avoid summary judgment by seeking to expand scope of defendant's alleged duties through declaration of plaintiff's expert; see *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1186—argument in opposition memorandum and

attorney's comments at hearing insufficient to raise triable issue; *Nativi v. Deutsche Bank Nat'l Trust Co.* (2014) 223 Cal.App.4th 261, 290—declarations in opposition to motion for summary judgment "are not a substitute for amending the pleadings to raise additional theories of liability"]

Thus, unless the parties stipulate to the insertion of the word "Delaware" in place of "New York" at ¶ 7, the Plaintiff will be given leave to file an amendment (as opposed to a Third Amended Complaint) to the Second Amended Complaint to this effect pursuant to CCP § 473(a)(1) on the grounds that the allegation that the Trust is governed by the law of New York is a "mistake in any other respect." If the parties stipulate, a proposed stipulation and Order will be submitted to the Court within five days of notice of ruling. If the parties do not stipulate, the Plaintiff is to submit the proposed amendment within five days of notice of the ruling. Defendant must be given thirty days to file an Answer. See CCP § 471.5(a). The matter will be taken under advisement upon the filing of the Order permitting the stipulation or upon the filing of Defendant's Answer.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 09/27/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Gamez et al. v. Community Regional Medical Center, et al.***, Superior Court Case No. 14CECG03344

Hearing Date: **September 29, 2016 (Dept. 501)**

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice.

Explanation:

The court's concern is that if the minor's life expectancy is rather short, an annuity that only starts paying out in the year 2031 may provide little to no benefit to the minor. The court would like to see evidence of the minor's life expectancy from a medical expert, and analysis of why the proposed annuity is in the best interest of the minor.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **9/28/16** (Date).

(17) **Tentative Ruling**

Re: ***Garcia v. United Auto, Inc. et al.***
Court Case No. 16 CECG 01904

Hearing Date: September 29, 2016 (Dept. 501)

Motion: Petition to Compel Arbitration, Pick Arbitration Forum, and Request for Cost and Fees and/or Sanctions

Tentative Ruling:

To deny without prejudice. To deny sanctions.

Explanation:

The party moving to compel arbitration must file a petition, if no lawsuit is currently pending, prepared in accordance with the rules applicable to motions generally. (Knight, Fannin, Chernick & Haldeman, *California Practice Guide: Alternative Dispute Resolution* (Rutter Group 2015) "Contractual Arbitration" §§ 5:301, 5:304; Code Civ. Proc., §1290.2.) The petition must allege specific facts demonstrating the existence of an arbitrable controversy, rather than mere conclusions, and must allege not only the existence of the arbitration agreement but "also that the opposing party refuses to arbitrate the controversy." (*Id*. at 5:307 [citing *Strauch v. Eyring* (1994) 30 Cal.App.4th 181, 186; see also *Spear v. California State Auto Assn*. (1992) 2 Cal.4th 1035, 1041].)

The petition to compel must set forth the provisions of the written agreement and the arbitration clause verbatim, or such provisions must be attached and incorporated by reference. (Cal. Rules of Court, rule 3.1330.) When a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine 1) whether the agreement exists and, 2) if any defense to its enforcement is raised, whether it is enforceable. The petitioner (seeking to compel arbitration) bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence. (*Rosenthal v. Great Western Fin. Securities Corp*. (1996) 14 Cal.4th 394, 413-414.) The party claiming a defense bears the same burden as to the defense. (*Ibid*.)

Respondents attack the arbitration agreement printed on the RISC as lacking in foundation and unauthenticated as it is merely attached to the declaration of counsel who declares it is a "true and complete copy" of the sales contract for the subject vehicle. However, a party petitioning to compel arbitration need not authenticate arbitration agreements in the petition to compel arbitration.

Condee v. Longwood Management Corp. (2001) 88 Cal.App.4th 215 is on point. In *Condee*, the moving party attached a signed copy of the relevant arbitration agreement to their petition to compel arbitration. (*Id*. at pp. 217–218.) Although no evidence was introduced to verify the authenticity of the signature, its authenticity was

never challenged. (*Id*. at p. 218.) The trial court nonetheless denied the petition, concluding that the arbitration agreement was not properly authenticated. (*Id*. at p. 217.) The appellate court reversed, noting that the procedure governing petitions to compel arbitration does not require that arbitration agreements be authenticated, in the same way that documents must be authenticated before they are offered into evidence at a trial. (*Id*. at pp. 218–219.) The court concluded that a party moving to compel arbitration "need only allege the *existence* of an agreement and support the allegation as provided in [California Rules of Court,] rule 371 [now 3.1330]." (*Id*. at p. 219, original italics.) Because defendants met this requirement in *Condee*, "the burden shifted to [the parties opposing arbitration] to prove the falsity of the purported agreement." (*Ibid*.)

Here, respondents have not proven that the arbitration agreement in the RISC is not authentic or false, but they have proven that it is not complete. The Declaration of Mohammad T. Saadeldin establishes that the parties executed an "Arbitration Addendum" in connection with the sale of the subject vehicle. The Arbitration Addendum states it is "part of the contract entered into between you, the buyer and seller ("we" or "us") with respect to your purchase of the vehicle described below, notwithstanding any reference in the contract to the exclusion of "other agreements of the parties." There is no description of any vehicle "below," but the Addendum does bear a stock number of 1259 in the right upper corner which is the same stock number as on the RISC and is dated June 4, 2014, the same date as is on the RISC.

Petitioners contend the Addendum is immaterial because they are suing only on the RISC, not the Addendum. This argument is poorly taken. The RISC and Addendum must be construed as one contract under Civil Code section 1642, which provides that "several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together[,]" because the two documents were executed at the same time and both pertain to petitioners' purchase of the vehicle from United Auto. (See, e.g., *Vons Companies v. Lyle Parks, Jr., Inc*. (2009) 177 Cal.App.4th 823, 834.)

Accordingly, by failing to completely set forth the arbitration agreement of the parties, petitioners have failed to comply with California Rule of Court 3.1330 and the petition must be denied at this time. Either petitioners or respondents may bring a subsequent petition to compel arbitration on the complete agreement of the parties, and petitioners may raise such defenses to any portions of the agreement as are allowed by law.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: MWS (Judge's initials) **on 9/28/16** (Date).

Tentative Rulings for Department 502

(24) **Tentative Ruling**

Re: ***Robmor Investments v. Montalbano***
Court Case No. 15CECG00818

Hearing Date: **September 29, 2016 (Dept. 502)**

Motion: Plaintiff's Motion to Amend Complaint to Substitute Plaintiff

Tentative Ruling:

To grant.

Explanation:

Plaintiff Robmor Investments has shown adequate proof of assigning its interest in the promissory note which is the subject of this action to CPI Investors, LP, which now wishes to be substituted as Real Party Plaintiff in this action pursuant to Code of Civil Procedure section 368.5. Defendant was given notice of the motion, and no opposition was filed. The substitution appears appropriate.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling Issued By: **DSB** (Judge's initials) **on** **9-27-16** (Date) .

Tentative Rulings for Department 503

(17) **Tentative Ruling**

Re: ***Kong v. Kings View***
Court Case No. 16 CECG 02140

Hearing Date: September 29, 2016 (Dept. 503)

Motion: Defendant's Demurrer to Complaint
Defendant's Motion to Strike Portions of Complaint

Tentative Ruling:

To overrule the general demurrer to the second cause of action. To sustain the general demurrer to the third cause of action with leave to amend. To grant the motion to strike references to attorney's fee's without leave to amend. To grant the motion to strike references to punitive damages with leave to amend. An amended complaint shall be filed and served within 10 days of the clerk's service of this minute order. All new allegations shall be in boldface type font.

NOTE: In the event that oral argument is requested, it will be heard Thursday, October 6, 2015, at 3:30 pm in Department 503.

Explanation:

Demurrer

Second Cause of Action – Wrongful Termination in Violation of Public Policy.

"[W]hile an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094 (*Gantt*), overruled on another ground in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.)

In *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889, the Supreme Court identified "four categories of employee conduct subject to protection under a claim of wrongful discharge in violation of fundamental public policy: '(1) refusing to violate a statute [citations]; (2) performing a statutory obligation [citation]; (3) exercising a statutory right or privilege [citation]; and (4) reporting an alleged violation of a statute of public importance [citations].' " (*Gantt*, *supra*, 1 Cal.4th at p. 1095; *Stevenson v. Superior Court*, *supra*, 16 Cal.4th at p. 889.)

With regard to the requisite policy underlying a wrongful termination in violation of public policy claim, the Supreme Court "established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be

supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court*, *supra*, 16 Cal.4th at pp. 889-890.)

Here, defendant claims that plaintiff has failed to articulate what public policy was breached and how defendant breached that public policy when it terminated plaintiff. The public policy alleged to have been violated is the right to privacy as set forth in the California Constitution, Article I, Section I, allegations made in paragraphs 1 and 19-21of the complaint which is which is incorporated into the second cause of action at page 25. The right to privacy satisfies the requirements for a wrongful discharge in violation of public policy claim.

Defendant contends that the right to privacy does not protect employees who are fired after voluntarily submitting to drug tests and test positive, as opposed to those who are fired for refusing to test. Defendant is incorrect. In *Skinner v. Railway Labor Executives' Assn*. (1989) 489 U.S. 602, 616-617 the United States Supreme Court held that blood and urine drug tests constituted invasions of a person right to privacy, both in the collection of the sample and in the laboratory analysis. The California Supreme Court held similarly in *Hill v. National Collegiate Athletic Assn*. (1994) 7 Cal.4th 1, 40-41 and *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 896. In *Smith v. Fresno Irrigation Dist*. (1999) 72 Cal.App.4th 147, the Fifth District Court of Appeal examined whether a ditchtender fired for a positive drug test could recover for wrongful termination in violation of public policy, invasion of privacy under the California Constitution, and for violation of his Fourth Amendment right under the federal Constitution to be free of unreasonable searches and seizures. Although the *Smith* court ultimately reversed the award in favor of the ditchtender employee, the resolution of the issues turned on whether the employee was employed in a safety sensitive position such that the employer's interest minimizing the risk of injury to its employees outweighed the plaintiff's privacy interests, not whether the employee consented to take the drug test. "Plaintiff's constitutional challenge thus focuses on his interest to be free from disclosure of the materials he has ingested. [Citation.] Plaintiff has a legally recognized privacy interest in precluding dissemination or misuse of such sensitive and confidential information. [Citation.]" (*Id*. at p. 161–162.)

Defendant's authority, *Feminist Women's Health Center v. Superior Court* (1997) 52 Cal.App.4th 1234, is inapposite. There, the employee signed a preemployment consent acknowledging the job included the requirement that health workers perform cervical self-examinations in front of other females. The appellate court found that this self-examination was "a reasonable condition of employment and does not violate the health worker's right to privacy where the plaintiff's written employment agreement evidences her knowledge of this condition and agreement to be bound by it." (*Id*. at p. 1249.) "Where the employee thereafter refuses to abide by the agreement, the employee's wrongful termination claim based on a violation of the right to privacy is rendered infirm." (*Ibid*.) Applying this reasoning to plaintiff's pleading, plaintiff has pled that the drug test imposed on him did not comport with the defendant's policy or practice and was not consented to. It was not performed after an accident which was known to have caused a "work-related injury" nor did plaintiff appear to be under the

influence of any banned substance. Both Golden and Fuentes told plaintiff that the company's "policy" was to test for drugs after accidents, but the policy manual did not support this. Moreover, Fuentes confirmed this had not been the company's practice. There is no evidence that the test was performed pursuant to written policy and thus no evidence of advance consent.

Accordingly, defendant's demurrer to the second cause of action is overruled.

Third Cause of Action – IIED

Defendant general demurs to the third cause of action for intentional infliction of emotional distress on two theories. First, defendant claims that the infliction of emotional distress is within the exclusive purview of the worker's compensation scheme. "[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code by characterizing the employer's decisions as manifestly unfair, outrageous, harassment or intended to cause emotional disturbance resulting in disability." (*Cole v. Fair Oaks Fire Protection Dist*. (1987) 43 Cal.3d 148, 160.) However, plaintiff is not alleging that that his termination caused his emotional distress, rather is alleges that the violation of his privacy rights caused his emotional distress. The distress did not arise out of the "normal part of the employment relationship."

Nor can the distress be dismissed under the reasoning of M*iklosy v. Regents of the University of California* (2008) 44 Cal.4th 876 and *Shoemaker v. Myers* (1990) 52 Cal.3d 1. Unlike these cases, plaintiff's wrongful termination in violation of public policy claim is not barred. Nor can an unconstitutional violation of one's privacy be said to be a risk inherent in the employment relationship.

Defendant's second attack on the intentional infliction of emotional distress cause of action is that it fails to completely allege each element of the cause of action. The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. (*Ibid*.) "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496.)

Defendant argues its behavior was not extreme and unreasonable, stating it is extremely reasonable to ask for a drug test after an accident. However, plaintiff has pled that he was forced to take a drug test in violation of defendant's own written policies and customary practices, thus making it likely the invasion of privacy was to humiliate and punish rather than protect. Given that plaintiff has plead that

defendant's act were improper, his conclusion that defendant acted with the intent to cause emotional distress is sufficient.

However, plaintiff has not alleged facts establishing that he has endured "severe emotional distress" meaning such "emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it." (See *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004; *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 [discomfort, worry, anxiety, upset stomach, concern, and agitation not serve emotional distress].) And for this reason, the demurrer should be sustained with leave to amend.

Motion to Strike

A motion to strike can be used to cut out any 'irrelevant, false or improper' matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc., § 431.10, subd. (b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

Attorney's Fees:

Attorney's fees are not recoverable unless provided for by contract or statute. (*City of Industry v. Gordon* (1972) 29 Cal.App.3d 90, 93.) A complaint must allege facts entitling the plaintiff to attorney's fees before attorney's fees can be awarded. (*Wiley v. Rhodes* (1990) 223 Cal.App.3d 1470, 1474.) Here, no basis for attorney's fees, either contractual or statutory, is alleged.

Plaintiff essentially concedes that no contract or cause of action exists which grants the right to attorney's fees but request leave to keep the references to attorney's fees in prophylactically, on the grounds that some fee bearing claim could be discovered. The motion to strike should be granted. Plaintiff may amend his complaint in the future if a fee bearing claim is discovered.

Punitive Damages:

Defendants claim that there are insufficient facts to support a claim for punitive damages. With respect to punitive damage allegations, mere legal conclusions of oppression, fraud or malice are insufficient (and hence improper) and therefore may be stricken. However, if looking to the complaint as a whole, sufficient facts are alleged to support the allegations, then a motion to strike should be denied. (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) Sufficient allegations supply the circumstances which make the malicious or despicable conduct apparent. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

There must be clear and convincing evidence that the defendant is guilty of oppression, fraud or malice. (Civ. Code, § 3294, subd. (a); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal. 3d 910, 922.) "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ.

Code, § 3294, subd. (c)(2).) Malice is "conduct which is [1] intended by the defendant to cause injury to the plaintiff or [2] despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code § 3294, subd. (c)(1).) "[A]bsent an intent to injure the plaintiff, 'malice' requires more than a willful and conscious disregard of the plaintiff's interests. The additional component of 'despicable conduct' must be found." (*College Hosp. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Despicable" conduct is defined as "conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." Such conduct has been described as "having the character of outrage frequently associated with crime." (*Tomaselli v. Transamerica Ins .Co*. (1994) 25 Cal.App.4th 1269, 1287; Cloud v. Casey (1999) 76 Cal.App.4th 895, 912.)

Here, forcing an employee to drug test in a circumstance neither required by written policy or practice, may be unconstitutional, targeted harassment, oppressive, and humiliating and suitable for punitive damages.

However, plaintiff has not properly pled an entitlement to punitive damages against the defendant because it is a corporation. Pursuant to Civil Code section 3294, subdivision (b), punitive damages may not be awarded against an employer based upon the acts of an employee unless the employer (i) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, (ii) authorized or ratified the wrongful conduct for which the damages are awarded or (iii) was personally guilty of oppression, fraud or malice. "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, subd. (b); see also *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 573.) Plaintiff has not alleged that the acts of defendant were done or ratified by an officer, director or managing agent of defendant.

Accordingly, the motion to strike the allegations concerning punitive damages is granted with leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling A.M. Simpson 9-28-16
Issued By: _____ on _____.
(Judge's initials) (Date)